

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Request for Waiver by Midport Electronics, Inc. to	)	FCC File No. 0001183563
Allow Operation on Frequencies in the 421-430	)	
MHz Band in the Detroit, Michigan Area	)	

**ORDER**

**Adopted: February 22, 2007**

**Released: February 23, 2007**

By the Deputy Chief, Mobility Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. In this *Order*, we address the above-captioned application and accompanying request for waiver of the Commission's Rules filed by Midport Electronics, Inc. (Midport) seeking authorization to operate on certain frequencies in the 421-430 MHz band, beyond 50 miles of the geographic center of Detroit, Michigan. For the reasons stated herein, we grant the waiver request.

**II. BACKGROUND**

2. On August 15, 2002<sup>1</sup> and February 3, 2003,<sup>2</sup> Midport filed applications for authorization to commence land mobile operations on various 421-430 MHz frequencies<sup>3</sup> at a distance of 52.8 miles from the geographic center of Detroit, Michigan. Midport also requested a waiver of Section 90.273 of the Commission's Rules<sup>4</sup> to permit its proposed operations.<sup>5</sup> Section 90.273(c)-(d) of the Commission's Rules requires that base and control stations and mobiles operating in the 421-430 MHz frequency band in the vicinity of Detroit be located within 80 kilometers (50 miles) of the center of the city.<sup>6</sup> Stations

<sup>1</sup> See FCC File No. 0000998539 and accompanying waiver request (filed Aug. 15, 2002, amended on Aug. 20, 2002, and Jan. 31, 2003) (First Request).

<sup>2</sup> See FCC File No. 0001183563 (Application) and accompanying waiver request (filed Feb. 3, 2003, amended on Apr. 14, 2003, and Jan. 24, 2007) (Request).

<sup>3</sup> In FCC File No. 0000998539, Midport sought authorization to operate on the following frequencies: 422/427.475 MHz, 424/429.450 MHz, and 424/429.550 MHz. In FCC File No. 0001183563, Midport seeks authorization to operate on the following frequencies: 422.225/427.225 MHz, 422.275/427.275 MHz, 422.550/427.550 MHz, 422.800/427.800 MHz, 422.850/427.850 MHz, 424.675/429.675 MHz, and 424.975/429.975 MHz. We note that several of these frequencies had been previously authorized to Midport and GRH & Associates, Inc. (GRH), an affiliated entity, under various licenses. However, these earlier licenses cancelled automatically due to Midport's (or GRH's) failure to construct or failure to construct in substantial accordance with its authorizations by, e.g., constructing facilities at an unauthorized location. See Midport Electronics, Inc., *Order*, 17 FCC Rcd 13778 (WTB PSPWD 2002) (*Midport Cancellation Order*). In its waiver request, Midport states that it inadvertently operated on the 421-430 MHz band frequencies at coordinates 41-39-20.9 N. latitude and 83-31-51.0 W. longitude. See Request at 1. Midport's current license application proposes to operate at essentially the same coordinates: 41-39-21.0 N. latitude and 83-31-52.0 W. longitude. See FCC File No. 0001183563.

<sup>4</sup> 47 C.F.R. § 90.273.

<sup>5</sup> See Request at 1.

<sup>6</sup> See 47 C.F.R. § 90.273(c)-(d). The geographic center coordinates for Detroit are 42-19-48.1 N. latitude and 83-02-56.7 W. longitude. See 47 C.F.R. § 90.473(c).

operating within these distance restrictions are authorized to transmit at a maximum of 250 watts effective radiated power (ERP).<sup>7</sup>

3. With its proposed site approximately 53 miles from the center of Detroit, Midport proposes to operate at a reduced power of no more than 80 watts output power (TPO).<sup>8</sup> Midport contends that the proposed service area would be equivalent to, or less than, the geographic area served if its proposed station were to operate at 90 watts TPO within the 50-mile geographic restriction area.<sup>9</sup> Consequently, Midport requests the waiver of Section 90.273(c) of the Commission's Rules.<sup>10</sup>

4. Midport argues that grant of the requested waiver would not undermine the fundamental purpose of Section 90.273(c).<sup>11</sup> Midport states that the rule was adopted "to provide for the most intensive use possible of this spectrum by land mobile entities throughout the Buffalo, Detroit, and Cleveland areas."<sup>12</sup> Midport adds that grant of the requested waiver would result in more extensive land mobile usage of this spectrum, and notes that it intends to make its service available, at no cost, to various charitable agencies and organizations in Ohio, such as the American Red Cross, food banks, and kitchens for the homeless.<sup>13</sup> Midport also submits that a secondary purpose of Section 90.273 is to avoid unduly impeding operations in the Amateur Radio Service.<sup>14</sup> Midport argues, in this regard, that the *de minimis* extension of its proposed station location beyond the 50-mile perimeter, coupled with its proposed reduced output power and its distance from authorized amateur radio stations in the Detroit area, would not have an adverse impact on any amateur radio station.<sup>15</sup>

5. On June 8, 2004, Futronics, Inc. (Futronics) filed a petition to deny the Application and Request (Petition).<sup>16</sup> Observing that the instant Request by Midport is "virtually identical" to Midport's First Request, with the frequencies requested being the only difference between the two, Futronics incorporates by reference in the Petition its comments (Futronics Comments) filed on February 14, 2003,

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<sup>7</sup> See 47 C.F.R. § 90.279(a)

<sup>8</sup> See Request at 2.

<sup>9</sup> *Id.* Midport proposes to operate mobile units within a 20-mile (32-kilometer) radius of coordinates very close to Detroit's geographic center (*i.e.*, 42-18-48.1 N. latitude and 83-02-56.7 W. longitude). See FCC File No. 0001183563.

<sup>10</sup> See Request at 1-2.

<sup>11</sup> See Request at 2.

<sup>12</sup> *Id.*, citing Amendment of Part 90 of the Commission's Rules to Provide for Private Land Mobile Operation in the 421-430 MHz Band in Detroit, Cleveland, and Buffalo, *Report and Order*, PR Docket No. 86-163, 2 FCC Rcd 825, 827 ¶ 27 (1987) (*Report and Order*).

<sup>13</sup> *Id.* at 4.

<sup>14</sup> *Id.* at 2-3.

<sup>15</sup> *Id.* at 3.

<sup>16</sup> Futronics, Inc., Petition to Deny (filed June 8, 2004) (Petition). As Futronics acknowledges, neither the Communications Act of 1934, as amended, nor the Commission's Rules provide opposing parties with a right to file petitions to deny private land mobile radio applications. See Petition at n.2, citing 47 U.S.C. § 309(a)-(b), (d). As Futronics also notes, however, *see id.*, it has been the Wireless Telecommunications Bureau's practice to treat pleadings opposing private land mobile radio applications as informal requests for Commission action pursuant to Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41. See, e.g., S&L Teen Hospital Shuttle, *Memorandum Opinion and Order*, 16 FCC Rcd 8153, 8155 ¶ 5 & n.14 (2001). We also have before us an Opposition to Petition to Deny filed by Midport on June 17, 2004 (Opposition) and a Reply to Opposition to Petition to Deny filed by Futronics on June 29, 2004 (Reply).

against the First Request.<sup>17</sup> In those comments, Futronics argued that Midport had not adequately demonstrated why it is not possible, or why it would be unduly burdensome, for Midport to operate its system within the permitted 50-mile area in conformance with the Commission's Rules.<sup>18</sup> Futronics also suggested that it would be a novel interpretation of the Commission's waiver standard if a party could establish good cause for waiver relief on the basis that it had filed an application with erroneous site information, and had operated at that site illegally for some period of time, but now needed a waiver to validate the illegal operation.<sup>19</sup> Futronics further asserted that Midport, in making its case for a waiver, relied primarily on its claim that grant of the requested relief would not have an adverse impact on amateur radio operations in the area.<sup>20</sup> This claim, Futronics contended, would be relevant only if the Commission determined that Midport had presented some compelling rationale for a deviation from the Commission's Rules.<sup>21</sup> According to Futronics, however, Midport did not present unique or unusual factual circumstances that would render application of the rule to Midport inequitable, unduly burdensome or contrary to the public interest, or show that Midport had no reasonable alternative.<sup>22</sup>

6. Futronics also stated in its comments opposing the First Request that the *Report and Order* adopting the 50-mile rule does not provide for a waiver of the distance requirement, and that Futronics's research did not identify any previous instance in which the Commission had waived the rule.<sup>23</sup> Additionally, Futronics contended that the public interest would not be served by granting waiver relief under the circumstances presented because the spectrum beyond the 50-mile geographic center of Detroit is allocated on a primary basis to Federal Government radiolocation operations pursuant to an agreement between the Commission and the National Telecommunications and Information Administration (NTIA).<sup>24</sup> Futronics pointed out that the Commission previously rejected proposals to allow for land mobile operations outside the 50-mile area because it would conflict with the Government

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<sup>17</sup> See Petition at 2. The Futronics Comments were filed in response to a January 15, 2003 Public Notice released by the former Public Safety and Private Wireless Division, Wireless Telecommunications Bureau, seeking comment on Midport's First Request. See Wireless Telecommunications Bureau Seeks Comment on Request for Waiver by Midport Electronics, Inc. to Allow Operation on Frequencies in the 421-430 MHz Band in the Detroit, Michigan Area, *Public Notice*, 18 FCC Rcd 219 (WTB PSPWD 2003). The Commission reorganized the Wireless Telecommunications Bureau effective November 13, 2003, and the relevant duties of the Public Safety and Private Wireless Division were assumed by the Public Safety and Critical Infrastructure Division. See Reorganization of the Wireless Telecommunications Bureau, *Order*, 18 FCC Rcd 25414, 25414 ¶ 2 (2003). Pursuant to a Commission reorganization effective September 25, 2006, certain duties of the Public Safety and Critical Infrastructure Division were assumed by the Mobility Division. See Establishment of the Public Safety and Homeland Security Bureau, *Order*, 21 FCC Rcd 10867 (2006).

<sup>18</sup> See Futronics Comments at 1-2, 6.

<sup>19</sup> *Id.* at 7. Futronics suggested that presumably the Commission would need evidence that Midport has not operated on these frequencies subsequent to license cancellation. *Id.* In the Reply, Futronics again posits that Midport may have continued to operate at the specified location after its earlier authorizations were canceled, and its requests for special temporary authority denied. See Reply at 3-6. As stated in the *Midport Waiver Order*, "should evidence surface that Midport has operated without authorization on 421-430 MHz frequencies subsequent to the *Midport [Cancellation] Order*, we reserve the right to initiate enforcement action." See *Midport Waiver Order*, 19 FCC Rcd at 14796 n.72.

<sup>20</sup> See Futronics Comments at 7.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 5-6.

<sup>24</sup> *Id.* at 2, 8. See Implementation of the Arrangement With Canada for Use of the 406.1-430 MHz Band in the Border Areas, and Use of the 421-430 MHz Band by Land Mobile Users in Detroit, Cleveland, and Buffalo, *Report and Order*, 58 Rad. Reg. 2d 1566, 1567 ¶ 4 (1985).

Radiolocation allocation.<sup>25</sup> Finally, Futronics suggested that NTIA and other governmental entities were unlikely to permit use of these frequencies for purposes other than national defense and homeland security.<sup>26</sup>

### III. DISCUSSION

7. A request for a rule waiver in the Wireless Telecommunications Services may be granted if it is shown that (a) the underlying purpose of the rule would not be served or would be frustrated by its application to the instant case, and that a grant of the requested waiver is in the public interest; or (b) unique or unusual factual circumstances of the instant case render application of the rule inequitable, unduly burdensome, or otherwise contrary to the public interest, or the applicant has no reasonable alternative.<sup>27</sup> Shortly after Futronics filed its Petition against the instant Midport Request, the Public Safety and Critical Infrastructure Division (PSCID or Division) adopted an *Order* granting Midport's First Request (*Midport Waiver Order*) based on a determination that Midport had demonstrated that waiver relief was warranted under the first prong of the Section 1.925 waiver standard.<sup>28</sup> As Futronics concedes in the Petition,<sup>29</sup> the instant Request is identical to Midport's First Request, except for the frequencies in question, and raises precisely the same issues. We therefore conclude that the instant Request should be granted for the same reasons that the First Request was granted.<sup>30</sup>

8. In the *Midport Waiver Order*, the Division found that it was unnecessary to require Midport to operate within the specified 50-mile area under the circumstances presented.<sup>31</sup> It determined that "Midport's proposed land mobile radio operations are intended to facilitate more extensive use of the spectrum," in keeping with the underlying purpose of the 50-mile rule to foster the greatest use possible of the 421-430 MHz band for land mobile radio operations in the Buffalo, Detroit, and Cleveland areas, consistent with interference concerns.<sup>32</sup> The Division further concluded that Midport's proposed operation with less than the maximum permissible antenna height and output power would actually "decrease the risk of interference to amateur operations when compared to licensees' operations at the

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<sup>25</sup> See Futronics Comments at 8. Additionally, Futronics noted that non-government stations may only be authorized to use Federal Government frequencies above 25 MHz if the Commission finds, after consultation with the appropriate government agency, that such use is necessary for coordination of government and non-government activities, and observed that there is no indication that such consultation had been initiated here or that it would likely be successful. *Id.* at 8-9.

<sup>26</sup> *Id.* at 9, citing Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum for Wind Profiler Radar Systems, *Notice of Proposed Rulemaking and Notice of Inquiry*, 8 FCC Rcd 2546, 2547 ¶ 6 (1993).

<sup>27</sup> See 47 C.F.R. § 1.925(b)(3). While Futronics argues that no provision for a waiver is provided in the *Report and Order* establishing the defined 50-mile area within which the subject frequencies may be assigned, we agree with Midport that rulemaking proceedings typically do not include specific provisions for a waiver of the rules being adopted because Section 1.925 of the Commission's Rules already provides a standard for rule waivers. See Opposition at 3.

<sup>28</sup> See Request for Waiver by Midport Electronics, Inc. to Allow Operation on Frequencies in the 421-430 MHz Band in the Detroit, Michigan Area, *Order*, 19 FCC Rcd 14788 (PSCID 2004) (*Midport Waiver Order*). The *Midport Waiver Order* was adopted on July 28, 2004, and released on August 5, 2004.

<sup>29</sup> See Petition at 2.

<sup>30</sup> Given our disposition on the merits, we do not reach Midport's argument that the Commission should decline to consider the Petition because it was filed sixteen months after the Application was filed without providing a justification for the delay. See Opposition at 2.

<sup>31</sup> See *Midport Waiver Order*, 19 FCC Rcd at 14794 ¶ 14.

<sup>32</sup> *Id.*

edge of the 50-mile area and at the maximum permissible antenna height and output power.”<sup>33</sup> With respect to potential interference to Federal Government radiolocation operations, moreover, we note that NTIA did not oppose the grant of Midport’s first waiver request to locate a base station outside the 50-mile zone, provided Midport utilized a four-meter antenna, limited its output power to eighty watts, and accepted a condition on its license prohibiting modification of the license to raise the antenna height or output power.<sup>34</sup> The Division imposed those conditions in the *Midport Waiver Order*,<sup>35</sup> and we do so here as well. We believe that, just as with respect to the earlier waiver request, “the purpose underlying the 50-mile rule would not be served by applying it to Midport when it is unlikely that either amateur or Federal Government licensees would experience interference from its proposed operations, as modified by the aforementioned conditions.”<sup>36</sup>

9. We also conclude that grant of the instant Midport Request would serve the public interest for the same reasons that grant of Midport’s First Request was found to serve the public interest.<sup>37</sup> Midport represents that grant of the waiver will allow more extensive land mobile usage of the 421-430 MHz frequencies in the Detroit area, without any greater risk of interference to amateur radio and Federal Government radiolocation operations that share that spectrum, and states in particular that the waiver will permit it to make its land mobile services available, at no cost, to various charitable agencies and organizations in Ohio, including the American Red Cross, food banks and kitchens for the homeless.<sup>38</sup> We can discern no basis for treating this Request differently from the First Request with respect to analysis of the public interest component of the waiver standard. We therefore grant Midport’s Request, and waive Section 90.273(c) of the Commission’s Rules.<sup>39</sup>

#### IV. CONCLUSION

10. We conclude that Midport has made the requisite showing that a waiver of the 50-mile distance restriction in Section 90.273 of the Commission’s Rules is warranted under the circumstances

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<sup>33</sup> *Id.* As in the case of the Midport’s earlier application and First Request, *see id.* at ¶ 15, there is a discrepancy between Midport’s instant Application on FCC Form 601 and the Request. Midport indicates in the FCC Form 601 that it proposes to operate with 90 watts TPO and 250 watts ERP, whereas in the Request it proposes to operate with a reduced TPO of 80 watts. (Midport confirms its intent to operate with a TPO of 80 watts in its Opposition. *See* Opposition at 4.) Here, as in the *Midport Waiver Order*, we will hold Midport to the ERP equivalent of 80 watts TPO, as proposed in the Request, and therefore limit Midport’s base stations to an ERP of 220 watts. *See Midport Waiver Order*, 19 FCC Rcd at 14794 ¶ 15. (In doing so, and as was also done in the *Midport Waiver Order*, we assume that Midport’s antenna gain minus any loss factors will convert 90 watts TPO to 250 watts ERP. *Id.* at 14794 n.60.)

<sup>34</sup> *Id.* at 14794 ¶ 14.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* In addition, we note that, in light of the adoption of the *Midport Waiver Order*, Futronics’ arguments regarding the absence of precedent for waiving Section 90.273(c), and the novelty of granting a waiver request in these circumstances, have been rendered moot. In any event, the Division did not find them persuasive in granting the earlier waiver request. *Id.* at 14975-96 ¶¶ 17-18. We also note that Midport has been operating Station WQAU486 pursuant to the *Midport Waiver Order* since 2004, and we have not received any interference complaints.

<sup>37</sup> *Id.* at 14796 ¶ 19.

<sup>38</sup> *See* Request at 4.

<sup>39</sup> In addition, we also grant a waiver of footnote US230 of the Table of Frequency Allocations set forth in Section 2.106 of the Commission’s Rules. *See* 47 C.F.R. § 2.106 n.230. Footnote US230 provides that non-government land mobile service be allocated on a primary basis in the bands 422.1875-425.4875 MHz and 427.1875-429.9875 MHz within 50 miles of Detroit. We therefore grant Midport a waiver of US230 on our own motion, as in the *Midport Waiver Order*. *See Midport Waiver Order*, 19 FCC Rcd at 14796-97 ¶ 20.

presented. In order to further ensure that this waiver is consistent with the public interest, we will impose the following conditions: Midport shall (1) utilize a four-meter antenna, (2) limit its output power to 80 watts TPO or its equivalent 220 watts ERP, (3) have an express condition on its license prohibiting it from filing a license modification application proposing to raise the antenna height and/or TPO/ERP, and (4) be licensed on a non-interference basis to Federal Government users.

## V. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, the request for waiver of Section 90.273(c) of the Commission's Rules, 47 C.F.R. § 90.273(c), filed on February 3, 2003, by Midport Electronics, Inc. IS GRANTED TO THE EXTENT STATED HEREIN subject to the conditions set forth in paragraph 11 *supra*.

12. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41, the Petition to Deny filed on June 8, 2004, by Futronics, Inc. IS DENIED.

13. This action is taken under delegated authority pursuant to Section 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Scot Stone  
Deputy Chief, Mobility Division  
Wireless Telecommunications Bureau